

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

PAUL HARRINGTON, JR.,

Petitioner,

-vs-

ROBIN KNAB, Warden, Chillicothe
Correctional Institution,

Respondent.

:

Case No. 3:08-cv-302

:

District Judge Walter Herbert Rice
Chief Magistrate Judge Michael R. Merz

ORDER ADOPTING SUBSTITUTED REPORT AND RECOMMENDATIONS

This case is before the Court on the Magistrate Judge's Substituted Report and Recommendations, recommending that the Respondent's Motion to Dismiss for lack of exhaustion be denied (Doc. No. 10). Respondent does not object to that conclusion, but does object to the Magistrate Judge's failure to rule that Petitioner will not be allowed to amend his Petition to add the claims presently pending in his motion to withdraw guilty plea proceedings in the Common Pleas Court.

The objected to ruling of the Magistrate Judge is actually a deferral of the issue. On this point, the Magistrate Judge ruled "The question whether Petitioner should be barred from amending his Petition to assert additional claims after completion of his pending motion to withdraw proceedings is premature and not ruled on at this point." (Substituted R&R, Doc. No. 10, at 3-4.) Respondent objected:

To allow the petition to proceed now and to then allow Petitioner to

amend his petition with new claims after his motion to withdraw his guilty plea is concluded, resulting in Respondent's having to file multiple returns of writ, encourages the very kind of "piecemeal litigation" that Rule 2 was designed to prevent. This is a drain on Respondent's, as well as the Court's, resources.

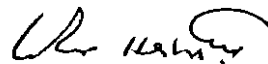
Therefore, Respondent objects to the Magistrate Judge's failure to rule that Petitioner will be barred from filing an amended petition and adding new claims after his motion to withdraw his guilty plea is concluded. Respondent asks this Court to either delay the case until the motion to withdraw the plea is concluded or to issue an order barring Petitioner from raising new claims after Respondent's answer is filed.

(Objections, Doc. No. 11, at 2-3.)

The District Court agrees with the Magistrate Judge that it would be premature for the Court to preclude now a motion to amend which has not yet been made by the Petitioner; the question of whether it ever will be made, what claims will be included, and whether it will be timely are all speculative at this point. No party has the right to demand that a federal court decide hypothetical future motions. To the extent that they seek to compel the Magistrate Judge or the District Court to decide motions not yet filed, the Objections are not well taken.

The alternative relief requested by Respondent – a stay of these proceedings pending conclusion of the state court proceedings – has never been requested of the Magistrate Judge. The District Court declines to order that relief in the absence of an opportunity for the Magistrate Judge to consider it in the first instance, particularly since the Petitioner has not been given an opportunity to respond..

~~December 8,~~
~~November 24,~~ 2008.



Walter Herbert Rice
United States District Judge